FILED
OCT 10 1955
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

No. 458

DR. HENRY L. PECKHAM, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALBERT J. AHERN, JR.
National Press Building
Washington, D. C.
Attorney for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Petition for Writ of Certiorari	1
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	
I	5
II	12
Conclusion	17

Table of Cases

Avery v. Alabama, 308 U.S. 444	12
Berger v. United States, 295 U.S. 78	10, 12
Burke v. United States, 9th Cir., 58 F.2d 739	11
Crichton v. United States, 92 F.2d 224, 67 App. D.C. 300	6, 9, 10
Cromer v. United States, 142 F.2d 697	11
DeMeerleer v. Michigan, 329 U.S. 663, 67 S.Ct. 596	11
Goodloe v. United States, 88 App. D.C. 102, 188 F.2d 621	7
Glasser v. United States, 315 U.S. 60	11
Hart v. United States, 70 App. D.C. 269, 105 F.2d 592	7
Mathew v. United States, 8th Cir., 15 F.2d 139	11
Peckham v. United States, 210 F.2d 693	6
Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 84 ALR 527	11
United States v. Hoffman, 56 Washington Law Reporter 449	7
United States v. Henry L. Peckham, Cr. No. 1264-50, U.S. District Court	7
United States v. Henry L. Peckham, Cr. No. 1026-47, U.S. District Court	7
Washington and G & R. Co. v. Hickey, 166 U.S. 521, 41 L.Ed. 1101, 17 S.Ct. 661	10
Williams v. United States, 78 App. D.C. 147, 138 F.2d 181	7

Constitutional Provisions and Statutes

Constitution of the United States Sixth Amendment	3
Title 22, Section 201, D. C. Code	2

IN THE

Supreme Court of the United States

No.

DR. HENRY L. PECKHAM, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Dr. Henry L. Peckham, Jr., by his counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of the United States District Court for the District of Columbia.

OPINION BELOW

The Opinion of the Court of Appeals is attached to this Petition and has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1955. Petition for Rehearing was denied on August 31, 1955. Petition for Rehearing En Banc was denied

on September 9, 1955. Associate Justice Black entered an Order extending the time within which to file Petition for Writ of Certiorari to October 10, 1955.

QUESTIONS PRESENTED

1. *Was not the Petitioner denied the protection of the Sixth Amendment* and the right to be informed of the nature and contents of the charge against him *when he was indicted for aborting a pregnant woman and was misled into a defense on the materiality of pregnancy* only to be met at the conclusion of the testimony by the sudden pronouncement of the Trial Judge, *sua sponte*, that the pregnancy alleged in the indictment was surplusage and that all Government testimony and all Petitioner's testimony on this issue was immaterial?

2. Does not the legislative history of Title 22, Section 201 of the D. C. Code conclusively show that Congress passed an ordinary every-day abortion statute in vogue in the great majority of the states which requires the Government to show pregnancy as a material element of the offense and does not the ruling of the court below that pregnancy was eliminated as a material element under the statute violate the legislative history of the Act and is it not contrary to this Court's repeated pronouncements that repeals by implication are not to be indulged in, particularly in criminal statutes?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 22, Section 201, D. C. Code:

> "Whoever with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug or substance whatever, or with like intent uses any instrument or means unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than 5 years;

or if the woman or her child dies in consequence of such act, be imprisoned for not less than 3 nor more than 20 years."

Sixth Amendment to the Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

Petitioner, Dr. Henry L. Peckham, Jr., a doctor of medicine in the District of Columbia was indicted for violation of Title 22, Section 201 of the D. C. Code alleging that he procured the abortion of one Mary Lee Ott who was then pregnant (Pet. Ap. 1a). The prosecuting attorney in his opening statement stated he would show by the evidence that the complaining witness was pregnant on or about May 2, 1951 (Pet. Ap. 2a-3a). The complaining witness, Mary Lee Ott, testified that she was pregnant in January of 1951 and testified further that Petitioner examined her and verified that she was pregnant (Pet. Ap. 2a-4a). The complaining witness testified that she went back on May 2, 1951 and that Petitioner performed an abortion on her (Pet. Ap. 2a-4a). The complaining witness testified she passed a fetus in the Hotel Harrington which was witnessed by her boy friend George Christiansen (Pet. Ap. 2a-4a). She testified the fetus was 8 inches long and 5 inches wide. The complaining witness had also testified that a Dr. Halstead had examined her and had informed her she was pregnant. The Petitioner denied that the complaining witness was pregnant when he examined her

on May 1, and May 4 of 1951. The Petitioner called as a witness Dr. Michael Miller who testified that it would have been medically impossible for the complaining witness to have aborted a fetus as she had described. Petitioner also called Dr. Halstead who denied he had ever seen the complaining witness or had told her she was pregnant. (Pet. Ap. 4a) The Government called one Dr. Christopher Murphy who also testified that it would have been medically impossible for the complaining witness to have passed a fetus such as she described in her testimony (Pet. Ap. 4a-5a). Throughout the course of the trial, the Trial Judge expressly stated on more than one occasion that pregnancy was material and that Petitioner's counsel could cross examine or introduce any evidence to rebut pregnancy (Pet. Ap. 3a). At the conclusion of all testimony, ~~for~~ counsel that pregnancy was immaterial. After a prolonged argument, the Trial Judge ruled that the prior opinions of the United States Court of Appeals for the District of Columbia Circuit were obiter dicta and that he was not bound by them. The case was submitted to the jury with the instruction of the Trial Judge that they could convict the Petitioner even though the complaining witness were not pregnant as alleged in the indictment. The jury returned a verdict of guilty and Petitioner was sentenced to serve 20 months to 5 years in the Penitentiary.

the trial judge suddenly informed

REASONS FOR GRANTING THE WRIT

1. Petitioner Was Denied the Protection of the Sixth Amendment and the Right to be Informed of the Nature and Contents of the Charge Against Him When He Was Indicted for Aborting a Pregnant Woman and Was Misled Into a Defense on the Materiality of Pregnancy Only to be Met at the Conclusion of the Testimony by the Sudden Pronouncement of the Trial Judge That the Pregnancy Alleged in the Indictment Was Surplusage and That All Government Testimony and All Petitioner's Testimony on This Issue Was Immaterial

Petitioner was charged with the crime of abortion *and it was alleged in the indictment that he aborted a woman who was pregnant on or about May 2, 1951.* The substantial constitutional issue which was regrettably not even discussed in the Opinion of the court below is *whether the Petitioner Dr. Peckham was denied the effective protection of the Sixth Amendment* to be informed of the nature of the charges against him and the concomitant right to the effective assistance of counsel *when his whole defense prior to trial* and *at the time of trial* was *devoted to contesting the allegation of pregnancy in the indictment* only to be told by the Trial Judge *sua sponte* at the conclusion of all the testimony that he now considered pregnancy to be immaterial both in the indictment and in the proof; that prior Appellate rulings to the contrary were obiter dicta and that he would instruct the jury to convict the Petitioner even if they believed that the woman was not pregnant as alleged in the indictment.

Prior to trial the prejudicial nature of the variance which occurred in this case can best be demonstrated by the following factors which Petitioner's counsel had before him prior to trial:

Petitioner's Preparation Prior to Trial

1. Petitioner's counsel had the indictment before him which alleged that the complaining witness was pregnant on May 2, 1951 (Pet. Ap. 1a).

2. Petitioner's counsel had the record of this very trial before him (Peckham vs. U. S., 210 F. 2d 693—judgment reversed).

3. In the first Peckham trial both the Government and the defense recognized that pregnancy must be shown beyond a reasonable doubt and the Trial Judge had instructed the jury in the first case as follows:

> "The elements of the offense that the Government must establish are as follows: (1) That the defendant prescribed or administered to the woman named in the indictment a medicine, drug, or other substance, or used on her some instrument or means (2) *that the woman was pregnant* at the *time this was done* (3) that the defendant did the act with the intent to procure a miscarriage."

4. There was also before counsel the ruling of the United States Court of Appeals in Peckham vs. U. S., supra, where they specifically approved the instruction of the trial court which included pregnancy as a constituent element of the offense. The court stated:

> "But the court did in fact require the Government to establish that defendant prescribed or administered a medicine, a drug, or other substance, or used on the woman some instrument or means, *that she was pregnant at the time*, and that the defendant did the act with the intent to procure a miscarriage."

5. Counsel had before him the record referred to in the footnote of the lower court, Crichton vs. United States, 92 Fed. 224, 67 Ap. D.C. 300, where both the *defendant and the Government conceded that pregnancy must be proven* beyond a reasonable doubt but on appeal the defendant contended that the evidence was insufficient to prove pregnancy beyond a reasonable doubt. To this argument the Court of Appeals replied in their Opinion:

> "The statute prohibits the use by any person of any substance or instrument for the purpose of procuring the *miscarriage of any pregnant woman* unless when such use is necessary to preserve the life or health of the woman."

6. Counsel had before him the decision of Judge Siddons decided in 1928 in U. S. vs. Hoffman, 56 Wash. Law Reporter 449, wherein the court stated the essential elements necessary to convict under the abortion statute and he stated:

> "The offense under the statute is permitted *if the woman be pregnant* and whether she is quick with child or not. Its purpose is to make it a criminal offense to interfere with the orderly process of nature where pregnancy has taken place, unless it be to preserve the life or health of the pregnant woman."

7. Counsel had before him the records and *opinions of all prior abortion cases* decided in the District of Columbia and in each and every one of them pregnancy was considered a constituent element of the offense. These opinions were:

(1) Hart vs. United States, 70 App. D.C. 269, 105 F. 2d 592.

(2) Williams vs. United States, 78 App. D.C. 147, 138 F. 2d 181.

(3) Goodloe vs. United States, 88 App. D.C. 102, 188 F. 2d 621.

8. Petitioner's counsel also had before him the prior abortion trials of Petitioner in which he was acquitted and they are:

(1) United States vs. Henry L. Peckham, Criminal No. 1264-50, U. S. District Court.

(2) United States vs. Henry L. Peckham, Criminal No. 1026-47, U. S. District Court.

In each one of these cases the jury was instructed that *pregnancy was a material and constituent element* under the Abortion Statute which must be proven beyond a reasonable doubt.

Now the Petitioner's counsel has portrayed all the information at his disposal prior *to trial and which guided* him in preparing the petitioner's defense *which was to*

the offense. However, *when all the testimony was in the Trial Judge suddenly reversed himself and confronted Petitioner's counsel with his pronouncement that the pregnancy alleged in the indictment was surplusage, that the Appellate rulings in the United States Court of Appeals for the District of Columbia Circuit were contrary obiter dicta; that all evidence on the issue of pregnancy introduced by the Petitioner was immaterial and that the jury could convict the Petitioner for abortion even if they did not believe she was pregnant on May 2, 1951 as alleged in the indictment.* This is reflected by the following statement of the court:

> "THE COURT: The Crichton says something about pregnant, but I think that is surplusage and dicta . . ."

Petitioner entered his objections and tendered instructions in accordance with his understanding that pregnancy was material which were overruled by the Trial Judge *and the jury was told that they could convict the Petitioner even if the complaining witness were not pregnant as alleged in the indictment.*

This ruling of the Trial Judge constituted a fatal prejudicial variance for the Petitioner and denied him due process of law and the protection of the Sixth Amendment. *He prepared a defense both prior to trial and at trial to a charge of aborting a pregnant woman on May 2, 1951.* When all the testimony was in, the issue of pregnancy was suddenly ruled immaterial. This denied the Petitioner the protection of the Sixth Amendment and was the very proposition discussed by Mr. Justice Sutherland in *Berger* v. *United States,* 295 U.S. 78, wherein he stated:

> "In Washington and G & R Company vs. Hickey, 166 U.S. 521, 41 L. Ed. 1101, 17 S. Ct. 661, this Court said that 'No variance ought ever to be regarded as material where the allegation and proof substantially correspond or where the variance was not of a character *which could have misled the defendant at trial.*'"

The decision of the lower court is in conflict with the rulings of other Circuit Courts of Appeal for it has been consistently held that there is an effective denial of the rights guaranteed by the Sixth Amendment when there is a *variance during the course of the trial which has prejudicially misled the accused in the preparation of his defense.* In this connection see *Mathews* v. *United States,* 8th Circuit, 15 F. 2d 139; *Burke* v. *United States,* 9th Circuit, 58 F. 2d 739 and *Cromer* v. *United States,* 142 F. 2d 697.

The record in this case conclusively shows that the Petitioner's defense was misled for it was predicated upon pregnancy as being material only to be met, when all testimony was in, by the ruling of the Trial Judge that pregnancy was *immaterial which vitiated the Petitioner's defense.*

Petitioner says unto the Court that in addition to being denied the rights guaranteed by the Sixth Amendment discussed above *there was the concomitant denial of the effective assistance of counsel* since the Petitioner's defense was based on the theory that pregnancy was material which was completely vitiated by the Trial Judge's ruling. It cannot be contended that effective assistance of counsel is limited to those cases where representation is a mere sham, *Powell* v. *Alabama,* 287 U.S. 45, 53 S. Ct. 55, 84 ALR 527, or where the Petitioner's counsel has a divided interest, *Glasser* v. *United States,* 315 U.S. 60, or where there is a complete absence of counsel, *DeMeerleer* v. *Michigan,* 329 U.S. 663, 67 S. Ct. 596.

Petitioner is entitled not only to know what he is charged with *but he is entitled to be effectively represented on the material elements of the charge.* In this case the record conclusively shows that the entire representation was devoted to attacking the issue of pregnancy. We feel the ruling of the Trial Judge therefore vitiated effective assistance of counsel within the scope of the Sixth Amendment. While courts may hesitate to grant a third trial, the unpopularity

of the accused should make the courts even more zealous to see that his constitutional rights are preserved.

Here the petitioner's defense was misled within the purview of *Berger* v. *U. S.*, *supra*, by the prejudicial ruling of the trial judge that vitiated the entire defense put in by petitioner's counsel to the allegation of pregnancy alleged in the indictment. As this Court stated in *Avery* v. *Alabama*, 308 U.S. 444:

> "Where denial of the constitutional right to assistance of counsel is asserted its peculiar sacredness demands that the court scrupulously review the record."

Therefore we ask this Court to grant the writ of certiorari to the judgment of the United States Court of Appeals for the District of Columbia Circuit.

2. The Ruling of the Lower Court That Pregnancy Is Immaterial in the Abortion Statute Passed by Congress for the District of Columbia is Incorrect and Violates the Clear and Expressed Legislative History of the Act Which Definitively Shows That It Was a Plain, Every-Day Abortion Statute Typical of Those in the Great Majority of the States Which Require Pregnancy to be Shown as a Constituent Element of the Offense

We invite the Court's attention to the reading of the Abortion Statute which reads as follows:

> "Whoever with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug or substance whatever, or with like intent uses any instrument or means unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than 5 years; or *if the woman or her child* dies in consequence of such act, be imprisoned for not less than 3 nor more than 20 years."

The first Code for the District of Columbia was enacted in 1901 and the Abortion Statute above appeared in that volume. The 1901 Code was adopted by the 56th Congress. We invite the Court's particular attention to the language

of the statute which refers to "the woman or her child". This phraseology defines the word "any woman" which appears in the initial part of the statute. To give it any other construction leads to an absurdity. If the Government's contention is correct in this case, every accused who has been convicted of abortion has been illegally sentenced because in every abortion there is a death of a child in utero since the common law distinctions between a woman with child and a woman quick with child have been abrogated in the statute. If the Government construction of this statute is correct and if the lower court's construction of the statute is correct, then in all cases an accused must be sentenced to a term of from 3 to 20 years because, as stated above, in every abortion the period of gestation is disturbed. The only other construction that could be placed on the statute if the lower court's opinion is to stand and that leads to an equal absurdity in construction is that all defendants charged with abortion will receive the minimum sentence if an unsuccessful attempt is made to disturb the gestation period and that if the abortion is a completed abortion and thus results in the death of the child in utero or the death of the woman, the maximum sentence of 3 to 20 years must be imposed. The Petitioner has been tried on four other occasions for the charge of abortion and has been acquitted. This fact, however, cannot justify a Court in construing this statute in a manner plainly inconsistent with the intent of Congress at the time the statute was passed.

The 1901 Code which was adopted for the District of Columbia was the work of a special committee of the Bar Association and the draft of the 1901 Code was submitted to all the judges of the Supreme Bench of the District of Columbia. The only report which was issued in connection with the adoption of the District of Columbia Code was H.R. 1017 of the 56th Congress. We now call the Court's attention to the following passages from the Congressional Record which, as far as counsel can ascertain, comprise the total hearings on the District of Columbia Code:

From 3585 of the Congressional Record, Mr. Underwood stated:

> "I would like to ask the gentleman from Wisconsin if he does not propose to give some explanation to the House as to the effects of the amendments covered in the Bill. I notice that some of them change the criminal law of the District and I do not think the House ought to be called upon to vote on a proposition of this kind without knowing what it is voting on."

Now Mr. Babcock:

> "I want to say to the House, Mr. Speaker, that most of the amendments, outside of one *relating to the divorce laws, are immaterial.* * * *"

We call the Court's attention to the following references to the Congressional Record which relate to the passage of the 1901 Code:

(NOTE: All the pertinent references to the Congressional Record relating to the passage of the 1901 Code are as follows:

> 2366, 2385, 2413, 2501, 3197, 3495, 3496, 3585, 3555, 3603 and 4024.

U. S. House Reports, Volume IV, Nos. 808-1078, 56th Congress, First Session. (Bill No. 9835.)

In the lower court's opinion holding that pregnancy is immaterial, the Opinion states:

> "But the Code of 1901 omitted all references to pregnancy and adopted the phrase "any woman" which has since been retained. A similar change in the English statute has long been recognized as making pregnancy unnecessary. We think the change in our statute has the same effect."

Petitioner asserts the fallacy of this argument is that the English statute and the Massachusetts statute and other statutes which have eliminated pregnancy as an essential

element have eliminated all words *connoting pregnancy such as child, unborn* child, *woman quick with child.* The *District of Columbia statute did not eliminate such references* and in the last three or four lines of the statute the word "any woman" is defined as a "woman or her child". It is significant to note that in those States that have eliminated pregnancy, the statutes contain specific language making pregnancy immaterial or, as in Massachusetts or England, all reference to pregnancy and all references to a child are eliminated. While it may be within the legislative wisdom to pass a statute such as the one in England or the one in Massachusetts, there is not a scintilla of legislative history to suggest that Congress intended to pass such a statute for the District of Columbia and on the contrary the great majority of the States who elect representatives to Congress require pregnancy to be shown as a constituent element of the offense of abortion. In fact at the present time the following states still require pregnancy to be shown:

District of Columbia: D. C. Code, 1940, Chap. 2, Sec. 22, Title 201.
Arkansas: Arkansas Statutes, 1947, Title 41, Sec. 301.
Connecticut: General Statutes of Conn., Rev. of 1949, 1930, S. 6056.
Georgia: Code of Ga., Ann., Title 26, Sec. 1102.
Idaho: Idaho Code, Title 18, Sec. 601, Chap. 6.
Louisiana: La. Rev. Statutes 1950, Chap. 1 & 87.
Maine: Revised Statutes of Maine, Chap. 121, Sec. 9.
Maryland: Ann. Code of Md., Article 27, Sec. 3.
Michigan: Compiled Laws of Mich., 1948, 750. 14.
Mississippi: Miss. Code, 1942, Sec. 2223.
New Hampshire: Rev. Laws of N.H., 1942, Sec. 12, p. 1826.
New Jersey:
New Mexico: New Mexico Statutes, 1953, Sec. 43, Sub. 1.
North Carolina: Gen Statutes of N.C. Recompiled 1953, Title 14, Sec. 44.
North Dakota: North Dakota Revised Code of 1943—1, Title 12, Sec. 2501.

Oklahoma: Oklahoma Statutes Ann., Title 21, Sec. 861.
Oregon: Oregon Revised Statutes, 163.060.
South Carolina: Code of Laws of S.C. 1952, Title 16, Sec. 83.
Texas: Vernon's Penal Code of the State of Texas, Article 1191, 1071, 641, 536.
Utah: Utah Code Ann., 1953, 76-2-1.
Vermont: Vermont Statutes, Revision of 1947, 8474.
Virginia: Code of Virginia, 1950, Title 18, Sec. 68.
West Virginia: W. Va. Code of 1949, Sec. 5923.

The following States have by specific words in the statute eliminated pregnancy as an element:

Wyoming	Nevada
New York	Missouri
Washington	Kentucky
Minnesota	Delaware
Rhode Island	Indiana

The following States are those States referred to in the Opinion of the lower court and these States have specifically eliminated any reference to pregnancy, child or woman quick with child and thus have eliminated pregnancy:

Pennsylvania	Massachusetts
Tennessee	California
Florida	Ohio
Iowa	

The Petitioner has been sentenced from 20 months to 5 years in the penitentiary and we feel the statement in the Opinion of the lower court—"We think the change in our statute has the same effect"—is not supported by close and searching study of the legislative history of the Abortion Statute.

This Court on numerous occasions has warned of the vice inherent in repeal by implication and we feel that in a criminal statute where the liberty of a defendant is involved this practice should not be indulged in. This is particularly true in this case where the 1901 Code was

the product of lawyers and judges in the District of Columbia and has for years been construed as requiring pregnancy to be shown. It should not now be changed in order to sustain the conviction of an unpopular accused. The construction of the Federal statute by the lower court is erroneous and we feel that this Court should grant the Writ of Certiorari to the judgment of the United States Court of Appeals for the District of Columbia Circuit.

CONCLUSION

For the reasons stated, the Petitioner asks that the Writ of Certiorari be granted.

Respectfully submitted,

ALBERT J. AHERN, JR.
National Press Building
Washington, D. C.
Attorney for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed in Open Court Apr. 4, 1952
Criminal No. 579-52

UNITED STATES OF AMERICA

vs.

HENRY L. PECKHAM, JR.

Indictment

The Grand Jury charges:

On or about May 2, 1951, within the District of Columbia, Henry L. Peckham, Junior, with intent to procure the miscarriage of Mary M. Ott, otherwise known as Mary Lee Ott, *who was then pregnant,* used upon her an instrument and means of a kind unknown to the Grand Jury, and administered to her medicine, drug and substance of a kind unknown to the Grand Jury.

CHARLES M. IRELAN
Attorney of the United States in and for the District of Columbia

A TRUE BILL:
CHARLES A. LYONS
Foreman.

Excerpts from Opening Statement of the United States Attorney

3 We intend to show you then that in the meantime, I believe, during the month of April, that George Christenson contacted the defendant about the abortion on Mary Ott. And he had some discussion with the defendant

in reference to the pregnancy of Miss Ott and the defendant performing an abortion on her.

• • • • • • • • • • •

We intend to show you at that time that the defendant put Miss Ott on this table, removing her undergarments, and there while she was on the table he again dilated the vagina by the use of the speculum, and then he put some medicine of some kind or substance of some kind and also used certain instruments on her.

The witness will tell you of the pain and the feeling of these instruments at the time they were insterted into her by the defendant.

• • • • • • • • • • •

At about eleven or twelve o'clock that night the evidence will show that she started passing these large clots and having terrific pain at the time and then about one or two o'clock in the morning, the evidence will show that Miss Ott passed the fetus, and the cord was cut.

And then ladies and gentlemen of the jury, the evidence will further show that Miss Ott put in a telephone call to the defendant and notified him that she had passed the fetus.

And that morning, the morning of May the 3rd, the defendant came to the Harrington Hotel and went to the room of Miss Ott and there, the evidence will show that, he then inserted instruments into her private parts at that time removing certain tissue and then further told Miss
4 Ott at that time that in a few days or the first part of the week that she was to come back to his office.

• • • • • • • • • • •

Testimony of Mary M. Ott

14 By Mr. McLaughlin:

Q. What else did he do at that time? A. Well, well, I could feel pain. I knew that he was, he was probing around in there but that's all I could say.

Q. How long would you say you stayed on the table at that time? A. I would say about twenty-five minutes, half hour.

Q. Now, can you say whether or not he used more than one instrument, inserted more than one instrument in your vagina? A. Yes, sir.

Q. Can you tell us whether or not he put any substance of any kind in your vagina? A. Well, at first he put something in that he told me was some sort of a cream or something, and then the needle, [46] and then this clamp instrument which was inside me while he was doing this. And—

• • • • • • • • • • •

Q. And as a result of those pains did anything happen? A. Yes. I, first I started to bleed and then I—George helped me into the bathroom and then I stayed in there quite some time until I passed the fetus.

Q. And did you actually see the fetus? A. Yes, sir.

Q. And can you tell us whether or not it was formed? A. It was partially formed. I remember seeing the feet and legs.

The Court: We will take our recess at this time.

(Thereupon there was a recess following which this then occurred:)

• • • • • • • • • • •

Mr. Ahern: There can't be a violation of the statute if the woman is not pregnant.

The Court: It doesn't make any difference who is—

Mr. McLaughlin: (interposing) Who is responsible, no.

The Court: You can attack her as to whether she is pregnant or not, naturally, but who made her pregnant wouldn't make any difference.

Mr. Ahern: Very well.

• • • • • • • • • • •

Testimony of Dr. Clark P. Halstead

278 Direct Examination

By Mr. Ahern:

Q. Doctor, would you give your full name? A. Clark P. Halstead, H-a-l-s-t-e-a-d.

Q. And, Doctor, are you a physician here in the District of Columbia? A. I am.

Q. And where is your office, Doctor? [927] A. 1418 M Street, Northwest.

Q. Now, Doctor, in response to a subpoena and in response to my directions, have you checked your records of patients that visited you in January of 1951? A. I have.

Q. Have you also checked as to February, 1951? A. Yes, I have.

Q. Now, Doctor, did, in searching those records, did in January or February of 1951 a Mary Christenson come to see you regarding pregnancy? A. I have no record of it in my files.

Q. Did a Mary Ott come to you? A. I have no such record in my files.

* * * * * * * * * *

Testimony of Dr. Christopher J. Murphy

315 Q. Yes. Now, let me ask you this, Doctor:

Let's assume a woman, just for the sake of argument, missed a period in November of 1950 or De-

316 cember. Let's make it December of 1950.

January, February, March, April, May. So that in May [974] she would be five months pregnant.

Now, Doctor, in your opinion as an expert, if that woman went to a doctor and allegedly had an injection from a hypodermic needle and certain dilations with an instrument and felt a certain burning sensation and then some five hours later, or, six hours later, began to have labor pains and then passed a fetus which was formed from the feet, but the top from the waist up was completely destroyed,

a mass, would you say that was medically possible? A. That would be impossible.

Mr. Ahern: That is all, Doctor.

* * * * * * * * * *

Colloquy Between Court and Counsel

361 So Judge, I typed up two instructions. I retyped 23 and I got 26 here.

And it is my view, your Honor, to violate the statute and I will admit I haven't pursued it any further, but it is my view to violate the statute the woman must be pregnant; whether or not she is viable, I won't press at this point.

* * * * * * * * * *

Mr. Ahern: I might say that Holtzoff said that it must be pregnant, too.

The Court: Well, I just can't follow Holtzoff. If the doctor thought that the woman was pregnant—this is an intent statute pure and simple specific intent.

* * * * * * * * * *

362 The Court: That is right. That doesn't make any difference in my interpretation of the law. That will give you something else to hang your hat on in the Court of Appeals.

This 26 is the substitute of—

Mr. Ahern: (interposing) I redictated 23 and I defined the term "live".

The Court: 23 is what?

Mr. Ahern: 23 is the one that we have under discussion right now.

The Court: That is the elements. Now, what is this?

Mr. Ahern: 26 is the—

The Court: (interposing) Amended one?

Mr. Ahern: Yes, on this point.

The Court: Well, I can't give that second element.

Mr. Ahern: No, but I mean, that puts it right to issue, your Honor.

The Court: Well, I will have to deny 23 and 26 because I can't find any justification for that pregnancy. I will write "denied" and then we can file it.

You see, this is not an attempt, itself. You see, so the crime wouldn't have to be completed; that is, the abortion wouldn't have to be completed.

This statute is not an attempt statute. This stat-
363 ute says [Separate Tr. 5] that where I use either a drug or an instrument and at that time I had in my mind an intention to procure a miscarriage—

Mr. Ahern: (Interposing) Even though one couldn't be performed?

The Court: That is right. You see, the distinction between the two makes no difference if I did it at that time and intended to do it.

Of course, the other statutes in other states use upon a pregnant woman or a woman with quick child or a woman quick with child, but our statutes have reference to just any woman, any woman, see?

Mr. Ahern: Well, then, Your Honor, if that were true, if your reasoning is to be followed he had no—well, first of all, I would say that couldn't follow for this reason, your Honor.

Once this indictment uses the word "pregnant"—

The Court: (interposing) I have got the cases here in which the indictment uses the word, surplusage.

Mr. Ahern: The Government didn't use —

The Court: (interposing) Well, I claim she was pregnant; then the jury can decide that she was or there can be a doubt in their minds as to whether she was pregnant, but I say according to all the law that I can find in our particular statute, it is immaterial whether the woman is pregnant or whether the indictment says surplusage.

[Separate Tr. 6] So that is why I wanted to bring you in and put this on the record so you will be protected too.

Mr. Ahern: Yes.

The Court: The Court has ruled that the question of pregnancy is immaterial; that if the jury believed beyond a reasonable doubt that the doctor was convinced that the complaining witness was pregnant, then the crime was completed if he administered a drug or used an instru-
364 ment with the intent to procure a miscarriage.

Now, in Crichton vs. the United States 67 Appeals, D. C., 301, the Court said this:

"The statute prohibits the use by any person of any substance or instrument for the purpose of procuring the miscarriage of any pregnant woman, unless when such use is necessary to preserve the life or health of the woman."

I hold that the phrase "pregnant woman" in the sentence just quoted is dictum because I am ruling that the question of pregnancy in the abortion statute is immaterial.

Now, that protects you.

* * * * * * * * * *

Instructions of Court to Jury

373 So that you are instructed that where the statute provides for the punishment of an attempt to procure a miscarriage of any woman without stating that she must be pregnant or a pregnant woman, it is immaterial whether the woman was actualiy pregnant or not.

* * * * * * * * * *

Prayer No. 26

392 [R. 1091]

Denied.

The jury is instructed that the elements of this offense which must be proved beyond a reasonable doubt are

(1) That the defendant prescribed or administered to the woman named in the indictment a medicine, drug or other substance, or he used on her some instrument or means.

(2) That the woman was pregnant at the time this was done.

(3) That the defendant did the act with intent to procure a miscarriage.

If these elements have not been proven beyond a reasonable doubt you must give the benefit of that doubt to the defendant and find him not guilty.

---

406 UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12261

HENRY L. PECKHAM, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided July 14, 1955

Mr. Albert J. Ahern, Jr., for appellant.

Mr. Lewis Carroll, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, and *Arthur J. McLaughlin*, Assistant United States Attorney, were on the brief, for appellee.

Before EDGERTON, WASHINGTON, and DANAHER, Circuit Judges.

PER CURIAM: Appellant was convicted on an indictment charging that on or about May 2, 1951, he used instruments upon and administered drugs to a named woman, then pregnant, with intent to procure her miscarriage. His chief, though not his only, contention on this appeal is that the District Court erred in instructing the jury that it was immaterial whether or not the woman was pregnant, if at the time the defendant believed she was pregnant.

If the statute makes pregnancy immaterial, the indictment cannot make it material. The government's brief contains a table showing that the so-called abortion statutes of many states explicitly make pregnancy necessary (*e.g.*, "any pregnant woman"); those of many other states explicitly make it unnecessary (*e.g.*, "a woman whether pregnant or not"); and those of a few states say "any woman", or "a woman", without mentioning pregnancy. Formerly the District of Columbia statute used the expression "any pregnant woman" or "any woman in any condition of pregnancy".[1] But the Code of 1901 omitted all reference to pregnancy and adopted the phrase "any woman", which has since been retained.[2] A similar change in the English statutes has long been recognized as making pregnancy unnecessary.[3] We think the change in our statute has the same effect.[4]

407

We find no error affecting substantial rights.

Affirmed.

---

[1] COMPILED STATUTES, Albert and Lovejoy, 1894, Chapt. XVI, § 13.

[2] At the time of the alleged offense the statute read: "Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years." D.C. Code (1901) § 809, 31 Stat. 1322; D.C. Code (1951) § 22-201.

[3] *Reg.* v. *Goodall*, 2 Cox Crim. Cases 41 (1846); *Reg.* v. *Titley*, 14 Cox Crim. Cases 502 (1880).

[4] In *Crichton* v. *United States*, 67 App. D.C. 300, 301-302, 92 F. 2d 224, 225-226, *cert. denied*, 302 U.S. 702, this court assumed that pregnancy was necessary, but this assumption did not affect the decision. *Cf. Peckham* v. *United States*, 93 U.S. App. D.C. 136, 143, 210 F. 2d 693, 700.

408 Filed July 14, 1955

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,261

HENRY L. PECKHAM, JR., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Before: EDGERTON, WASHINGTON, and DANAHER, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

PER CURIAM

Dated: July 14, 1955.

---

419 Filed Aug. 31, 1955

Order

Upon consideration of appellant's petition for a rehearing or amendment to this Court's opinion, it is

ORDERED by the Court that the aforesaid appellant's petition be, and it is hereby, denied.

PER CURIAM

Dated: August 31, 1955

420 Filed Sep. 9, 1955

Order

Upon consideration of appellant's petition for a rehearing in banc in the above-entitled case, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

PER CURIAM

Dated: September 9, 1955

Circuit Judge Prettyman did not participate in the foregoing order.

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1955

HENRY L. PECKHAM, JR., M. D.

vs.

UNITED STATES OF AMERICA

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 10th, 1955.

/s/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 30th
day of September, 1955

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	3
Conclusion	6

CITATIONS

Cases:

Commonwealth v. *Longwell*, 79 Pa. Sup. 68	4
Commonwealth v. *Taylor*, 132 Mass. 261	4
Crichton v. *United States*, 92 F. 2d 224, certiorari denied, 302 U.S. 702	5
Eggart v. *State*, 40 Fla. 527	4
Fisher v. *United States*, 328 U.S. 463	3, 5
Ford v. *United States*, 273 U.S. 593	6
Peckham v. *United States*, 210 F. 2d 693	5
People v. *Ramsey*, 83 Cal. App. 2d 707	4
Regina v. *Goodall*, 2 Cox Crim. Cases 41	4
Regina v. *Titley*, 14 Cox Crim. Cases 502	4
State v. *Snyder*, 188 Iowa 1150	4

Statutes:

Act of January 19, 1872, *Compiled Statutes*, Abert and Lovejoy, 1894, Ch. XVI, Sec. 13	3-4
Act of June 29, 1953, 67 Stat. 93	5
22 D.C. Code 201	2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 458

DR. HENRY L. PECKHAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 8a-9a) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered July 14, 1955 (Pet. App. 10a). A petition for rehearing was denied on August 31, 1955 (Pet. App. 10a). On September 30, 1955, Mr. Justice Black extended the time for filing a petition for a

writ of certiorari to and including October 10, 1955 (Pet. App. 11a), and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District of Columbia abortion statute, 22 D.C. Code (1951) 201, was properly construed by the district court and the court of appeals for that circuit as not requiring proof that the woman involved was in fact pregnant.

STATUTE INVOLVED

22 D. C. Code 201 provides:

> Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.

STATEMENT

Petitioner was convicted of procuring an abortion in violation of 22 D. C. Code (1951) 201, and was sentenced to imprisonment for twenty months to five years. The indictment alleged that the woman upon whom the abortion was performed was then pregnant (Pet. App. 1a). The government

introduced proof to such effect which petitioner attempted to refute (Pet. App. 2a-5a). The trial court ruled, however, that, under the District of Columbia statute, the question of pregnancy was immaterial; that if the jury should believe beyond a reasonable doubt that petitioner was convinced that the complaining witness was pregnant, then the crime would be completed if he administered a drug or used an instrument with intent to commit an abortion (Pet. App. 7a). The judge so instructed the jury (Pet. App. 7a). On appeal, the court of appeals held that the trial court was correct in its construction of the statute (Pet. App. 8a-9a).

ARGUMENT

Petitioner's contention—that the Court of Appeals for the District of Columbia Circuit misconstrued the local District of Columbia abortion statute—presents no issue calling for review by this Court. It is well established that, with respect to local issues, the Court of Appeals for the District of Columbia Circuit acts in the capacity of the highest court of a state. In such matters, the policy of this Court "is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed." *Fisher* v. *United States*, 328 U. S. 463, 476.

The interpretation of the statute by the courts below is clearly not "egregious error." As the opinion below points out, the statute in effect before 1901 had used the phrase "any woman in any

condition of pregnancy."[1] Section 809 of the 1901 Code, like the statute presently involved, simply refers to "any woman." Before 1901, a similar change in English statutes had been held to render immaterial the fact of actual pregnancy. *Regina* v. *Goodall,* 2 Cox Crim. Cases 41 (1846); *Regina* v. *Titley,* 14 Cox Crim. Cases 502 (1880). Thereafter various American states amended their criminal laws with respect to abortion in conformity with the English law. State statutes which use the phrase "any woman" have been widely interpreted, in accordance with the English cases, as not requiring proof of pregnancy. *Commonwealth* v. *Taylor,* 132 Mass. 261 (1882); *Eggart* v. *State,* 40 Fla. 527, 533 (1898); *People* v. *Ramsey,* 83 Cal. App. 2d 707, 717 (1948); *State* v. *Snyder,* 188 Iowa 1150, 1154 (1920); *Commonwealth* v. *Longwell,* 79 Pa. Sup. 68, 72 (1922).

Petitioner argues (Pet. 13, 15) that the 1951 District of Columbia statute should not be read in the same way because there is a reference to "child" in the latter part of the statute providing

---

[1] Act of January 19, 1872, *Compiled Statutes,* Abert and Lovejoy, 1894, Ch. XVI, Sec. 13, provided:

"Any person who shall administer, or cause to be administered, *to any woman in any condition of pregnancy,* any medicine, drug, substance, or thing whatsoever, with the intention thereby to produce a miscarriage by any such woman, or to prevent her from giving birth to the child with which she may be pregnant, or shall use on any such woman any instruments, or any other means for said purposes, shall, in the case of the death of said woman by any of said substance or means, or in the case of said child therefrom, be guilty of manslaughter * * *." [Emphasis supplied.]

for a heavier penalty "if the woman or her child dies in consequence of such act."[2] But if, as petitioner argues (Pet. 13), any abortion of a pregnant women must result in the death of a "child" as that term was used in the statute, then there is even greater reason for interpreting the provision for a lesser penalty as not requiring proof that there was a "child" in existence.[3]

The courts below had ample precedent for their interpretation of the statute. And even if the question were closer than it is, the principle announced by this Court in the *Fisher* case, 328 U.S. at 476, would apply: when "the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere."

The fact that petitioner, with some basis in dictum in a prior decision,[4] may have thought that the statute would be otherwise interpreted does not establish that he was deprived of a fair trial or the effective assistance of counsel. A court is certainly not required to decide a question before it in accordance with the manner in which an accused has prepared his defense. The fact that

---

[2] The present statute, as amended by the Act of June 29, 1953, 67 Stat. 93, refers to the death of "the mother".

[3] Petitioner was sentenced under the lesser penalty.

[4] In *Crichton* v. *United States*, 92 F. 2d 224 (C.A. D.C.), certiorari denied, 302 U.S. 702, where the issue was whether the indictment had to negative the proposition that the miscarriage was necessary to preserve the life of the mother, the court of appeals assumed that pregnancy was necessary. The same assumption was made at petitioner's prior trial. See *Peckham* v. *United States*, 210 F. 2d 693, 700.

the issue of pregnancy was held immaterial did not vitiate petitioner's defense (Pet. 11). Petitioner took the stand in his own defense and denied committing an abortion upon the complaining witness (R. 259-271). The court's ruling merely took from the jury as immaterial one issue which petitioner thought would be submitted. This is not a prejudicial variance. Cf. *Ford* v. *United States,* 273 U. S. 593, 602.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

NOVEMBER 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 925543 911

FILED
DEC 30 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

No. 458

DR. HENRY L. PECKHAM, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

ALBERT J. AHERN, JR.
National Press Building
Washington, D. C.
Attorney for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

No. 458

DR. HENRY L. PECKHAM, JR., *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Dr. Henry L. Peckham, Jr., by his counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the judgment of the United States District Court for the District of Columbia. This Court on December 5, 1955, denied the Petition for Certiorari.

QUESTION PRESENTED

1. The Sixth Amendment to the Constitution is violated when one is not adequately informed of the charges against him. Is it not also violated when as in this case an accused is erroneously informed of the charges against him such that he is misled in preparing his defense both prior to trial and at the trial?

STATEMENT OF THE CASE

For a detailed statement of the case see the Petition for Certiorari filed pages 3 to 4. Suffice it to say the Petitioner was indicted for aborting a *pregnant* woman (Petitioner's Appendix 1a). The Government in their opening statement said they would prove pregnancy and in support of that allegation they introduced testimony showing how pregnant the witness was at the time of the alleged abortion and introduced inflammatory testimony showing the size of the fetus destroyed including vivid descriptions of the length and size of the fetus in support of the allegation of pregnancy contained in the indictment. In Petitioner's prior trial the jury had been instructed that they must believe that the woman was pregnant as alleged in the indictment beyond a reasonable doubt.

Petitioner's main defense was directed to the issue of pregnancy and he produced a number of witnesses calculated to impeach the Government contention of pregnancy. All through the trial the court, the prosecuting attorney and Petitioner's counsel considered pregnancy to be a material element. When the last witness testified for the Government, a Doctor Murphy, and after he had stated that the complaining witness could not have ejected a fetus of the size and description testified to by the complaining witness the court on its own motion sua sponte for the first time stated that all prior decisions for the United States Court of Appeals for the District of Columbia Circuit were obiter dicta and *ruled that all testimony on the issue of pregnancy was immaterial.* The jury was instructed over the objections of Petitioner's counsel, that the pregnancy alleged in the indictment was immaterial and they could convict the Petitioner even if the complaining witness were not pregnant as alleged in the indictment. Petitioner was convicted and sentenced to twenty months to five years in the penitentiary.

ARGUMENT

1. The Sixth Amendment to the Constitution is violated when one is not adequately informed of the charges against him so that a defense can be intelligently prepared. It is also violated, as it was in this case, when an accused is given misleading information as to the charges against him such that he is prejudicially misled into preparing his defense both prior to trial and at the time of trial.

The indictment in this case read as follows:

> "On or about May 2, 1951, within the District of Columbia, Henry L. Peckham, Junior, with intent to procure the miscarriage of Mary M. Ott, otherwise known as Mary Lee Ott, *who was then pregnant,* used upon her an instrument and means of a kind unknown to the Grand Jury, and administered to her medicine, drug and substance of a kind unknown to the Grand Jury."

With this indictment before the Petitioner, we call the Court's attention to the items listed under Petitioner's preparation prior to trial listed at pages 5 to 7 in the Petitioner's Petition for a Writ of Certiorari. The reality of the prejudice which resulted at the Petitioner's trial is listed at pages 8 and 9 in the Petitioner's Petition for a Writ of Certiorari.

We sincerely suggest to this Court that involved in this case is an issue far transcending the merits or lack of merits to the charges involved in the Petitioner's case. *The substantial constitutional issue which is squarely before this Court is whether the Government may insert matter in an indictment, consider that matter material, introduce testimony in support of it, such that the accused meets the issue at the trial in the belief that it is a material element, only to have his defense literally pulled from under him by a ruling at the conclusion of the trial that all the testimony on this issue is immaterial.* In this case, the Petitioner *prepared his defense to a charge* that he allegedly *aborted a pregnant woman* only to find at the conclu-

sion of the trial that it didn't matter whether the woman was pregnant or not and all his defense on this issue was thus stricken. Needless to say, the Government enjoyed the substantial benefit of introducing the inflammatory testimony on this "immaterial issue" in the form of descriptive testimony of the fetus, the size of the fetus, the bleeding and destruction of the fetus, the length of the pregnancy and other matters intended to support the allegation in the indictment of pregnancy.

The facts in this case come precisely within the rule announced by this Court in *Berger* v. *United States*, 295 U. S. 78, where this Court in discussing the ramifications of the Sixth Amendment stated:

> "In Washington and G & R Company vs. Hickey, 166 U. S. 521, 41 L. Ed. 1101, 17 S. Ct. 661, this Court said that 'No variance ought ever to be regarded as material where the allegation and proof substantially correspond or where the variance was not of a character which could have misled the defendant at trial.'"

We think it is fundamental to due process of law that an accused under the protections of the Sixth Amendment must be clearly informed of the charges against him and if he is given misleading charges containing misleading elements and is thus misled into a useless defense, he is denied the protection of the Sixth Amendment. To allow the Government to benefit from such a device would be to encourage misleading indictments such as occurred in this case and will in effect nullify the substantial benefits of the Sixth Amendment. No one can dispute that our defense in this case throughout the whole trial was devoted to battering the Government contention of pregnancy as alleged in the Government indictment. We were therefore prejudicially misled into a fruitless defense and we therefore

say it is the duty of this Court to grant this Petition for Rehearing.

Respectfully submitted,

.....

ALBERT J. AHERN, JR.
National Press Building
Washington, D. C.
Counsel for Petitioner

I certify that this Petition is filed in good faith and not for the purpose of delay. and is restricted to the grounds stated in par 2 of Rule 58.

.....

ALBERT J. AHERN, JR.